

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 370

MAGNESIUM CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT*

**MEMORANDUM FOR THE NATIONAL LABOR
RELATIONS BOARD**

The question presented is whether the National Labor Relations Board is required to give plenary review to a regional director's determination of the unit appropriate for purposes of representation under the National Labor Relations Act before entering an unfair labor practice order based on that determination. Section 3(b) of the Act specifically permits the Board to delegate its authority to make such determinations to its regional directors, and provides only for discretionary Board review, which was denied in

this case. The First Circuit's negative answer to this question, as the petition correctly states, conflicts with the decision of the Second Circuit in *Pepsi-Cola Buffalo Bottling Co. v. National Labor Relations Board*, 409 F. 2d 676, in which the Board's petition for certiorari was denied, 396 U.S. 904.¹

In *National Labor Relations Board v. Olson Bodies, Inc.*, 420 F. 2d 1187 (C.A. 2), however, petition for a writ of certiorari pending, No. 238, 1970 Term, a different panel of the Second Circuit² stated that it did not regard *Pepsi-Cola* "as making remand automatic whenever the Board has declined to review a decision of a regional director under powers delegated to him pursuant to § 3(b)," but as applying only to an issue which "'is difficult and requires a fine-drawn balancing of facts and law'" (*id.*, at 1190).³ Despite the Second Circuit's apparent narrowing of its *Pepsi-Cola* decision, the Board still be-

¹ The Fourth Circuit's apparent approval of *Pepsi-Cola*, in *National Labor Relations Board v. Clement-Blythe Cos.*, 415 F. 2d 78, 82, is dictum, for the court, in remanding the latter case to the Board, stated (*id.*, at 81, n. 6): "We do not reach the question of whether the Board could discharge its duty by adopting the reasons supplied by the Regional Director. In this case the Regional Director gave no reasons."

² The panel consisted of Judges Friendly, Smith, and Feinberg. Only Judge Smith was on the *Pepsi-Cola* panel.

³ Moreover, Judge Friendly, who wrote the opinion in *Olson*, stated that he was "inclined to doubt whether *Pepsi-Cola* gave adequate recognition to the 1959 amendment of § 3(b) of the National Labor Relations Act empowering the Board to delegate various powers to a regional director, and the pertinent legislative history * * *." 420 F. 2d at 1190.

lieves, for the reasons given in its petition for certiorari in *Pepsi-Cola*, No. 469, 1969 Term, that the issue is of importance in the administration of the Act, that it will continue to be the subject of litigation,⁴ and that a definitive ruling by this Court is appropriate.

For these reasons, the Board does not oppose the present petition.

Respectfully submitted.

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JULY 1970.

⁴ The First Circuit has concluded that the Second Circuit's effort to confine *Pepsi-Cola* to "difficult" issues is "an unsatisfactory compromise," which would be difficult to apply and "would frustrate rather than foster the expeditious disposition of cases intended by Congress" (Pet. in No. 370, p. 24).